ing themselves liable to the grantees or their assignees for any expenditure made in cutting and skidding them. Quigley Furniture Co. *v.* Rhea, 114 Va. 271, 76 S. E. 330.

A deed conveying standing timber giving the purchaser five years in which to cut and remove the same from the time they should commence cutting it, does not give the purchaser a perpetual right to enter and cut the timber but merely gives him a reasonable time to do so. Brown *v.* Surry Lumber Co., 113 Va. 503, 75 S. E. 84. A conveyance of standing timber giving the right for a specified time to cut and remove the same without a further right, in event of failure to remove in such time, to such additional time as the grantee might desire upon paying interest on the selling price annually, only conveys title to such timber as may be cut and removed within the specified time and within such reasonable extensions thereto as the grantee shall be entitled to, or as may be agreed upon by the parties and does not convey the right to cut and remove the timber for indefinite time. Young *v.* Camp Mfg. Co., 110 Va. 678, 66 S. E. 843. And where H., by written contract, sold T. & Bro. certain timber, and allowed them four years to cut it down, and afterwards endorsed on the contract these words: "I agree to extend the time for cutting timber as fixed in this contract each year B. rents and operates the G. steam mills, said extension to cover a period of five years from the expiration of this within contract, this extension of time being based on said B. renting and operating said G. steam mills;" and before the expiration of the four years, said mills burned down and were never rebuilt, and had never since been rented and operated by T. & Bro., it was held, that the extension was to begin after the expiration of the four years, and the condition upon which the extension was to begin, never was fulfilled. Hughes *v.* Tinsley & Bro., 80 Va. 259. In the absence of stipulations as to the time in which the timber must be cut and removed it is generally held that this must be done within a reasonable time. Howe *v.* Batchelder, 49 N. H. 204; Goette *v.* Lane, 111 Ga. 400, 36 S. E. 758; Hill *v.* Hill, 113 Mass. 103, 18 Am. Rep. 455; Wood *v.* Elliott, 51 Mich. 320, 16 N. W. 666; Hoit *v.* Stratton Mills, 54 N. H. 109, 30 Am. Rep. 119; Andrews *v.* Wade (Pa.), 3 Sad. 133, 6 Atl. 48.

PILCHER *v.* PILCHER.

March 11, 1915.

[84 S. E. 667.]

1. Wills (§ 133*)—Validity—"Signature."—Under Code 1904, § 2514, declaring that no will shall be valid unless it be in writing and signed by the testator or by some other person in his presence in such a manner as to make it manifest that the name is intended as a signature, and, unless it be wholly written by the testator, the signature shall be acknowledged in the presence of at least two competent witnesses who shall subscribe the will in the presence of the testator, a holograph will, intended as such, which was signed only with

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

the testator's initials, is valid, the statute not describing what shall be a "signature" and the term ordinarily meaning a sign, stamp, or mark impressed as by a seal, or the name of any person written in his own hand, signifying that the writing preceding it accords with his own wishes or intention.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 342-344; Dec. Dig. § 133.* 13 Va.-W. Va. Enc. Dig. 748; 14 Va.-W. Va. Enc. Dig. 1079.

For other definitions, see Words and Phrases, First and Second Series, Sign.]

2. Witnesses (§ 193*)—Competency—Communications between Husband and Wife.—A wife is, despite Code 1904, § 3346a, cl. 3, prohibiting a wife from testifying as to confidential communications by her husband, competent in a suit to establish his will to testify as to statements made by her husband, where they were made in the presence of a third person.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 740, 741; Dec. Dig. § 193.* 13 Va.-W. Va. Enc. Dig. 923; 14 Va.-W. Va. Enc. Dig. 1096.]

3. Wills (§ 179*)—Validity.—That a testator after preparing one holograph will wrote out another, which made the same disposition of his property, but did not sign it, does not affect the validity of the first.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 456, 457; Dec. Dig. § 179.* 13 Va.-W. Va. Enc. Dig. 753; 14 Va.-W. Va. Enc. Dig. 1079; 15 Va.-W. Va. Enc. Dig. 1071.]

Error to Chancery Court of Richmond.

Proceeding by Mrs. Alice McCabe Pilcher for the probate of an instrument as the will of Edwin M. Pilcher, deceased, opposed by John M. Pilcher. The will was admitted to probate, and contestant brings error. Affirmed.

I shall make use of the clear and accurate outline of the occurrences in this case found in the brief of counsel for the defendant in error as furnishing a sufficient presentation of the material facts. It is as follows:

"Edwin W. Pilcher died in the city of Richmond, Va , on the 16th day of January, 1913, at the home of his sister, Mrs. Worsham, at the age of 46 years, after an illness of about six months, from an affection of the heart, known as endocarditis, leaving surviving him his widow, the appellee, and his father, the Rev. John M. Pilcher, his sole heir at law and next of kin. He had been a member of the bar of that city for about 20 years, and,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

for some years preceding his death, was a commissioner in chancery of the chancery court of the city of Richmond. He was regarded as an accurate and careful lawyer, and experienced in the drawing of legal papers.

"For seven years prior to his last illness he had been engaged to be married to the lady who is now his widow, who lived in Wheeling, W. Va., but their marriage had been postponed from time to time because her mother's health was bad, and she was the only daughter at home. Early in December, 1912, when Mr. Pilcher's condition had become very serious, his fiancée came to Richmond and they decided to be married at once, so that she might remain with him and help nurse him. They were accordingly married in his sick chamber on December 10, 1912, at the home of his sister, Mrs. Worsham.

"On December 15, 1912, Mrs. Pilcher's sister, Mrs. Belle K. Woods, came to Richmond and stayed with Mrs. Pilcher for about a week. On December 17th, or 18th, while Mrs. Woods was alone with Mr. Pilcher in his sick chamber, he told her that he wished to make his will, and requested her to get him a piece of paper for that purpose. She was making some objection to his undertaking to write his will then, when Mrs. Pilcher entered the room, took her seat beside his bed, and proceeded to finish in pencil a letter to her mother, which she had already partly written in ink. Mr. Pilcher then said to his wife, 'I am going to make my will,' and asked her for a piece of paper. She, too, tried to dissuade him, but he reached over and took from Mrs. Pilcher her pencil, her uncompleted letter, and the book, or magazine, upon which she was writing, and, resting the book, or magazine, against his knee wrote with the pencil, upon the back of the sheet on which Mrs. Pilcher had already written part of her letter in ink, the following words:

"'I give to my wife, Alice McCabe Pilcher, all of my property, real and personal. E. M. P.'

"He then tore off that part of the paper on which these words were written, and, holding it up, said, 'Girls, this is my will. I have left Allie everything I have.' Mrs. Woods commented on the brevity of the document, and he replied, 'The shorter, the better.' Mrs. Woods then commented on the use of his initials, and he replied: 'Why, that is as good a will as any man can make; that will hold in any court, almost a mark will go, Belle.' He then said to Mrs. Woods: 'I want you to preserve this. That is my will. I have left everything to Alice. I want you to see that she takes care of it.' Mrs. Pilcher then placed the paper in a book or magazine in which she was pressing some violets, and Mrs. Woods did not see it again until it was found

in Mr. Pilcher's bag in February, 1914, although Mr. Pilcher within the next day or two asked her where the paper was.

"On Christmas day, 1912, a friend came to see Mr. Pilcher while he was taking his bath, and, in hurriedly removing the basin, Mrs. Pilcher knocked off the table the magazine containing this paper, and the paper fell into the water. Mr. Pilcher made an effort to rescue it, but Mrs. Pilcher picked it up and, in the effort to dry it, the writing was blurred. Mrs. Pilcher does not remember what became of the paper after that, although she does remember looking for it. She says that she did not see it again until it was found 14 months afterwards under the circumstances to be hereinafter narrated.

"After this paper fell into the water, although it does not appear exactly when, at the request of Mr. Pilcher, Mrs. Pilcher brought to his bedside a package of his private papers, which he had expressed the wish to have preserved, and left them with him, and it was in that package that the will was subsequently found.

"On December 26, 1912, Mr. Pilcher wrote in pencil a formal holograph will, leaving all of his property to his wife, and appointing her as executrix thereof, but affixed to this paper neither his name nor initials. On cross-examination, Mrs. Pilcher stated that she knew why he wrote this paper, and that she did not think that he considered it as a will, but upon objection of counsel for contestant, she was not permitted to testify as to why it was written. This paper of December 26th was laid aside by Mrs. Pilcher, and was found after Mr. Pilcher's death in the drawer of the dresser in her room.

"Mr. Pilcher died on January 16, 1913, and Judge Daniel Grinnan, who was then a practicing attorney and had, for many years, been a warm personal friend of Mr. Pilcher, took charge of and undertook for Mrs. Pilcher, the management of his affairs and estate, as she, because of her mental distress and agitation, was in no condition to do so. The paper dated December 26, 1912, above referred to, was found in Mrs. Pilcher's dresser and turned over to Judge Grinnan. The fact that this paper was not signed escaped the attention of all of the family, and even of Judge Grinnan, who, on January 23, 1913, accompanied Mrs. Pilcher and Mrs. Woods to the chancery court of the city of Richmond for the purpose of having said paper admitted to probate as Mr. Pilcher's will. Upon reaching the court the paper was shown to the presiding judge, who called Judge Grinnan's attention to the absence of any signature. Thereupon Judge Grinnan abandoned the idea of offering the paper for probate and, instead, immediately moved on behalf of Mrs. Pilcher for her qualification as administratrix, and she at once quali-

fied as such, although on account of a mistake in her name in the bond it was necessary for her to sign another bond on January 24th. In qualifying as administratrix, the clerk administered to her the formal oath to the effect that as far as she knew or believed Mr. Pilcher left no will. A few days later Mrs. Pilcher returned with her sister to her old home in Wheeling, W. Va.

"Several weeks thereafter, in the latter part of February, 1913, Mrs. Pilcher was reminded by her sister, Mrs. Woods, of the will executed by Mr. Pilcher on December 17 or 18, 1912, and she at once wrote to Judge Grinnan telling him that such a paper had been drawn by Mr. Pilcher, and Judge Grinnan replied urging her to make a search for it, and to let him know if she found it.

"At that time her mother was very ill, requiring the constant attention of Mrs. Pilcher, her sister, and two trained nurses, and this condition remained unaltered until her mother died in October, 1913. In accordance, however, with Judge Grinnan's advice, Mrs. Pilcher and her sister then made such search for the will as their mother's condition permitted, but without success.

"After her mother's death in October, 1913, it was determined to break up the family home in Wheeling, and in February, 1914, while preparing to move, Mrs. Pilcher and Mrs. Woods came across a satchel of Mr. Pilcher's, which Mrs. Pilcher had carried from Richmond after his death, and in which they found a bundle of his private papers which he valued very highly, the same bundle which Mrs. Pilcher had handed to him at his request some time after Christmas day, 1912. In sorting over this bundle of papers they found an envelope upon which was written in the handwriting of Mr. Pilcher, but unsigned, this indorsement, 'My will, keep.' The envelope contained the paper which had been written by Mr. Pilcher on December 17 or 18, 1912, together with memoranda of certain personal directions to Mrs. Pilcher. At that time Mrs. Pilcher had no reason to think that there would be any contest over the validity of the paper as Mr. Pilcher's will, she attached no special value to the envelope, and, therefore, did not preserve it.

"Mrs. Pilcher at once showed the will to her father's attorney in Wheeling, who advised her to take it in person to Richmond. She was then quite sick and unable to leave home, but as soon as her physician would allow her to travel, which was in the early spring, she brought the will to Richmond, where it was offered for probate on April 10, 1914.

"After notice to the Rev. John M. Pilcher, the father, sole heir and next of kin of E. M. Pilcher, deceased, as provided by

law, and upon an issue of devisavit vel non, both parties waiving a jury, the court heard the evidence, and admitted the said paper to probate as the will of E. M. Pilcher by order entered on the 9th day of June, 1914, from which order this appeal has been taken."

George Bryan, of Richmond, for plaintiff in error.
John B. Minor, of Richmond, for defendant in error.

WHITTLE, J. (after stating the facts as above). Stripped of immaterialities, the dominant question presented by this record for our decision is the validity of a holograph will, at the end of which the writer, to authenticate the paper, has attached his initials by way of signature, instead of his full name. At the outset it is conceded that the precise question is of first impression in this jurisdiction, though affirmative precedent for the proposition is not lacking elsewhere. The circumstance is stressed by counsel for plaintiff in error that in McBride *v.* McBride, 26 Grat. (67 Va.) 476, Judge Staples, who delivered the opinion of the court, expressed doubt whether signing a holograph will with the initials of the testator's name constituted a sufficient signing. In that case, McBride had caused the draft of a will to be prepared by his attorney, with the terms of which he had expressed his approval, but postponed its execution until he could secure two particular persons to act as subscribing witnesses. A few days later he wrote a letter to his brother in Texas, informing him of his domestic troubles, and assigning reasons for wishing to disinherit a certain child. After directing his brother to burn the letter, he concluded as follows: "I don't know where to direct this letter, and don't like much to send it on uncertainties, and will not sign it. You know who it is from if you get ———," and signed the letter, "J.," an initial of his Christian name. Two months after reading the draft of the proposed will, McBride was accidentally killed, not having executed the paper. The court held that the letter was not a testamentary paper, either alone or as connected with the draft of the will.

It is obvious that no other conclusion could have been reached on those facts. The proposed will was never signed, and the fact that McBride did not intend the initial "J." as a signing of the letter conclusively appears on its face. He directed his brother to burn the letter, and expressly declared that he would not sign it, and did not wish to be identified with the paper in any way. The learned judge, in discussing the question of signing by "initials," at page 487 of 26 Grat., observes:

"In determining whether this letter constitutes a valid testamentary act, there is one other view which ought not to be omitted. It has been held in England that a will is valid if signed

with the initials of the testator's name, or even his mark without any signature. It must be borne in mind, however, that under the English statute every will, even though written wholly by the testator, must be attested by witnesses. When, therefore, in England, an initial is used only, the attestation of the witnesses very clearly indicates that the testator designed that this form of signature should be a signing. Under our statute, an autograph will is valid without witnesses. Whether we can recognize an initial as sufficient, to the same extent as the English courts, may not be so clear. Upon that question we express no opinion. Its decision is not necessary for any of the purposes of this case.'

The dictum of a lawyer of Judge Staples' acknowledged ability and learning is entitled to, and certainly would receive from this court, most respectful consideration. But Judge Staples not only expressed no opinion on the question, but explicitly declined to do so on the ground that it was not necessary for any of the purposes of that case. He does, however, refer to the fact that it is held in England "that a will is valid if signed with the initials of a testator's name, or even his mark without any signature." He also calls attention to the fact that the English statute requires attesting witnesses to holograph wills as well as others, and makes the suggestion that it may be the attestation of the subscribing witnesses that gives assurance that the use of initials was designed as a signature. But the English cases holding the initials of the testator to be a sufficient signature are not confined to instances where the names of attesting witnesses are written in full. The cases go further and hold that the signature of the testator by initials is sufficient, when the attesting witnesses also sign by initials.

Thus, in Goods of Blewett (1880), 5 Law Rep. Prob. Div. p. 116, the court said:

"The only question then, is whether the signature and subscription by initials only are sufficient. A mark is sufficient though the testator can write. Baker *v.* Dening, 8 Ad. & E. 94. Initials, if intended to represent the name, must be equally good. The language of the Lord Chancellor in Hindermarsh *v.* Charlton, 8 H. L. C. 160, at page 167, seems equally applicable to the testator's signature as to the witnesses' subscription: 'I will lay down this as my motion of the law that to make a valid subscription of a witness there must either be the name or some mark which is intended to represent the name;' and Lord Chelmsford says: 'The subscription must mean such a signature as is descriptive of the witness, whether by mark or by initials, or by writing the name in full.'

So, in Margary and Layard *v.* Robinson (1886), 12 Law Re-

ports, Prob. Div. p. 8, where the signature of the testator was by mark and that of the attesting witnesses by initials, it was held that the signature of the testator and the subscription of the witnesses were sufficient.

Having noticed what is required by the English statute of wills, and the construction placed upon it by the courts of that country, let us turn now to our own statute, the correct interpretation of which, at last, must control the case in judgment.

[1] Va. Code 1904, § 2514, reads as follows:

"No will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover, unless it be wholly written by the testator, the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

It will be observed that the statute makes no distinction in the character of the signature, or what constitutes a sufficient signature, between holograph and attested wills. It gives precisely the same force and effect to the former that it accords to the latter. By force of the statute one is made the equivalent of the other, though the manner of proving the two kinds of instruments is different; nevertheless, each possesses the same authenticity.

Now, all the authorities, English and American (including the quære in McBride *v.* McBride) agree, that if this will had been attested, it would have been well signed under the English statute. Therefore, being holograph, it must follow that it is well signed under the Virginia statute, since that statute does not require attestation in such case.

Nor does the Virginia statute define what shall constitute a "signature," but only prescribes that the will shall be signed "in such manner as to make it manifest that the name is intended as a signature."

Webster's New International Dictionary defines "signature" to be:

"A sign, stamp, or mark impressed, as by a seal. * * *" Also: "The name of any person, written in his own hand, to signify that the writing which precedes accords with his own wishes or intentions; a sign manual; an autograph."

The standard Dictionary defines it to be:

"The name of a person, or something representing his name, written, stamped, or inscribed by himself, or by deputy. * * *"

No dictionary, so far as we are advised, restricts the meaning

of "signature" to a written name; therefore, according to these definitions, what constitutes a signature must largely depend upon the circumstances of each particular case, though in all cases the intent is a vital factor. Whatever symbol is employed, it must appear that it "is intended as a signature."

Although, as remarked, there is no decision of this court directly in point, authority in this country is abundant for the proposition that the use of his initials by a testator animo signandi is a sufficient signing of his name.

The discussion of the subject in Knox's Appeal (1889), 131 Pa. 220, 18 Atl. 1021, 6 L. R. A. 353, 17 Am. St. Rep. 798, is instructive. In that case a letter, testamentary in character, in the handwriting of the deceased and signed by her with her Christian name only, was held to be a valid will. And the court was of opinion that a will signed by the testator with his initials made a stronger case for upholding the instrument. It quotes with approval from Browne on the Statute of Frauds, § 362, as follows:

"In cases where the initials only of the party are signed, it is quite clear that, with the aid of parol evidence which is admitted to apply to them, the signature is to be held valid."

In 1 Jarman on Wills (6th Am. Ed.) 106-108, it is said:

"It has been decided that a mark is sufficient, notwithstanding the testator is able to write, and though his name does not appear on the face of the will. A mark being sufficient, of course the initials of the testator's name would also suffice."

The leading text-writers speak with one voice on the subject. Jarman on Wills, supra; Page on Wills, § 172; Schouler on Wills (3d Ed.) § 303; 1 Redfield on the Law of Wills (3d Ed.) pp. 203, 205; Rood on Wills, §§ 254, 255.

That testator's signature by a mark is sufficient is well settled by the Virginia authorities. Smith *v.* Jones, 6 Rand. (27 Va.) 36; Clarke *v.* Dunnavant, 10 Leigh (37 Va.) 14; Rosser *v.* Franklin, 6 Grat. (47 Va.) 1, 52 Am. Dec. 97; 3 Lomax's Dig. (2d Ed.) pp. 38, 70; 2 Minor on Real Property, § 1252; Long's Notes on the Law of Wills (1910), p. 17.

Adverting for a moment to the facts: We have before us a paper which, though exceedingly brief, is distinctly testamentary in character and terms, and by which the disposition of the property, in the circumstances, was a natural one. Testator was a lawyer in full possession of his mental faculties, and there is no question that the paper was wholly written by him, and signed with his initials at the appropriate place for his signature, the end of the instrument. Immediately before the paper was written, testator said to his wife and her sister, Mrs. Woods: "I am going to make my will," and after it was written, holding the

paper up, he said: "Girls, this is my will. I have left Allie everything I have." In response to Mrs. Woods' comment on the brevity of the document, he remarked, "The shorter, the better." When she called attention to the use of his initials, he replied: "Why, that is as good a will as any man can make; that will hold in any court, almost a mark will go, Belle." He then said to Mrs. Woods: "I want you to preserve this. That is my will. I have left everything to Alice. I want you to see that she takes care of it." This evidence, and it is uncontradicted, plainly establishes testamentary intent and that the initials were used animo signandi.

The decisions of this court hold that the position of the signature at the end of the will furnishes sufficient internal evidence of finality or completion of intent. Ramsey *v.* Ramsey, 13 Grat. (54 Va.) 664, 70 Am. Dec. 438; Roy *v.* Roy, 16 Grat. 418, 419, 84 Am. Dec. 696; McBride *v.* McBride, 26 Grat. (67 Va.) 476, 487; Dinning *v.* Dinning, 102 Va. 467, 469, 470, 46 S. E. 473.

We entertain no doubt, either from the standpoint of reason or authority, that the writing in controversy was executed in substantial compliance with the statute, and, as the chancery court held, is the true last will and testament of Edwin Pilcher, deceased.

[2] There are two other subordinate assignments of error which may be briefly noticed.

(1) The first involves the ruling of the trial court on the admissibility of certain testimony of Mrs. Pilcher, under section 3346a, cl. (3), of the Code. The observations on that point by his honor, Judge Beverley T. Crump, who presided at the trial below, show a correct conception of the restrictive features of the statute. He sedulously safeguarded the admission of such communications between husband and wife as the statute was intended to protect, and confined the examination of the wife strictly to matters with respect to which she was clearly a competent witness. The communications to the admission of which exception was taken were made in the presence of a third person, and in no just sense were either confidential or privileged.

[3] (2) We attach no significance to the circumstance that some ten days after the first will was executed Mr. Pilcher prepared the draft of a more formal will. Admittedly he did not sign it, and the paper indicates no change of purpose on his part, since by the last paper, as by the first, he leaves all his property to his wife. Besides, Mrs. Pilcher, in response to the question on cross-examination, "* * * Can you tell the court what induced Mr. Pilcher to write the paper of December 26th, if he considered the first paper his will?" answered: "I do not

think he considered this last paper he wrote as a will. He told me—" Mr. Bryan (the propounder of the question): "I object." Witnesses: "I do know what induced him to do it." But, at that point, an objection was again interposed and sustained by the court.

It thus appears that the information was at hand, but was excluded on technical grounds. Whatever may have been the intention of the testator, however, in writing the second paper, it was never signed by him and could not have had the effect of revoking his will.

Upon the whole case, we are of opinion that the sentence of the chancery court is plainly right and must be affirmed.

Affirmed.

Note.

Privileged Communications.—Our attention has been called to what is termed a "serious conflict" between Wilkes *v.* Wilkes, 115 Va. 886, 80 S. E. 745, and Pilcher *v.* Pilcher, 10 Va. Appeals 269, 84 S. E. 667, in regard to privileged communications, under § 3346a, subd. 3, between a husband and wife. The letter calling attention to these cases says: "The Wilkes case held her to be incompetent as to any communication, whether confidential or not, and apparently although made in the presence of the family, with no request for secrecy; whilst the Pilcher case does not refer to the Wilkes case and holds that communications made by the husband to the wife in the presence of a third party, which were not confidential or privileged, does not render the wife's testimony inadmissible."

It does not appear from the Wilkes case that the communication was made in the presence of a third person. If a third person was present, it must have been their son, who was of unsound mind, and this would not change the case, for the law seems to require that such third person must have been a competent witness when the communication was made and not competent or living at the time of the giving of the testimony. (See Sieving *v.* Seidelmeyer, 7 O. Dec. Reprint 609, 4 W. L. Bull. 213). And Schierstein *v.* Schierstein, 68 Mo. App. 205, shows that the reason for this exception fails when the conversation is had in the presence of an infant or other person totally incapable of comprehending it, and in such case the conversation is privileged.

Furthermore it has been held that communications between husband and wife in the presence of the immediate family of children should not be testified to by either the husband or the wife. In Robin *v.* King, (29 Va.) 2 Leigh 140, 144, it was held that the wife was not competent to testify as to statements she heard her husband make in the presence of the family with no request to keep them secret, and even though the husband was not a party to the suit, and though the husband was dead. In that case Judge Carr says: "Are we to say, that every word spoken, in the thoughtless, careless confidence of the domestic circle, is free for public disclosure, unless secrecy be expressly inioined? Is not the converse of the proposition true? And would it not have a most mischievous effect, would it not seriously break in upon that confidence which is the charm of domestic life, if men should, from our decisions, have cause to fear, that after they were in their graves, their reputation might be injured, and their children ruined, by the declaration they had

made in the bosoms of their families? This freedom from restraint or apprehension, in the intercourse of one's own fireside, seems to me so necessary to the quiet and repose of society, that I am fearful of trenching upon it in the slighest degree."

Other cases hold that where a conversation between the husband and wife has been had in the presence of no other person except their family of young children, all of whom are shown not to have taken any part in or paid any attention to the conversation, it must be deemed a private conversation between the husband and wife and privileged. (See Jacobs *v.* Hesler, 113 Mass. 157; Hopkins *v.* Grinshaw, 165 U. S. 342. 41 L. Ed. 737, 17 S. Ct. 401; Lyon *v.* Prouty, 154 Mass. 488, 28 N. E. 908.) In this last case the court held that the privilege does not exist as to a conversation in the presence of a fourteen-year-old daughter, who would have been a competent witness.

The Pilcher case unquestionably states the law correctly and does not infringe the rule which does not allow a husband or wife to testify as to the conduct or conversation of each other, made known in the frankness and freedom of a confidential intercourse. (See Allison *v.* Barrow, 43 Tenn. (3 Coldw.) 414, 91 Am. Dec. 291; Insurance Co. *v.* Shoemaker, 95 Tenn. 72, 31 S W. 270.) In the last case Wilkes, J., said: "It is practically impossible to lay down any general rule to determine what matters occur between husband and wife by virtue of or in consequence of marital relation, and are therefore forbidden by this statute to be testified to. It is evident that all secret confidential disclosures and communications between the husband and wife, the publication of which would betray conjugal confidence and trust, and tend to produce discord in the family, are prohibited. But matters and conversations that occur between husband and wife and third persons, or in the presence of third persons, and are not intended to be secret or of a confidential character, are clearly competent. The facts of each case must control to a large extent the rule in such case."

Numerous other cases might be cited which are in accord with this general rule that conversations between husband and wife or admissions made by one to the other in the presence of third parties are not privileged. Schierstein *v.* Schierstein, 68 Mo. App. 205; Reynolds *v.* State, 147 Ind. 392; Fay *v.* Guynon, 131 Mass. 31; Long *v.* Martin, 152 Mo. 668, 54 S. W. 473; People *v.* Lewis, 16 N. Y. Supp. 881, 9 N. Y. Cr. R. 340, 62 Hun 622, affirmed 136 N. Y. 633, 32 N. E. 1014; McCague *v.* Miller, 36 O. St. 595; In re Buckman, 64 Vt. 313, 33 Am. St. Rep. 930. The case of Campbell *v.* Chace, 12 R. I. 333, may be said to hold the contrary. In the case of In re Buckman's Will, 64 Vt. 313, 24 Atl. 252, 33 Am. St. Rep. 930, 931; Rowell, J., said: "That was not a matter in which she treated with him in marital confidence when they were alone, but was purely a business transaction had and done between them in the presence of witnesses, evidently called as such, which precludes the idea of marital confidence."

R. C. WALKER.